IN ARBITRATION PROCEEDINGS PURSUANT TO THE MEMORANDUM OF AGREEMENT BETWEEN THE PARTIES

CSMCS No. ARB-00-0401

Christopher D. Burdick, Arbitrator

Oroville Mid-Management Association,
United Public Employees of California,
LIUNA, Local 792

Grievant

and

The City of Oroville

Respondent

Involving the Grievance of
Lt. Bret Smith

A W A R D

The grievance of United Public Employees of California, LIUNA Local 792, AFL-CIO ("Union") on behalf of its Oroville Mid-Management (OMMA) Unit and OMMA's member, Police Lieutenant Bret Smith ("Smith"), came on for hearing on March 22 and June 20, 2001 at City Hall, Oroville, California.

Appearing on behalf of the Union were Christopher D. Darker, Business Representative; Maggie Campbell, UPEC Labor Representative; and Lt. Smith, OMMA's President and the individual grievant. Appearing on behalf of the City of Oroville ("City") were City Attorney Dwight Moore, Esq; City Administrator Ruben Duran; and Chief of Police Mitchel Brown.

Christopher D. Burdick had previously been selected as arbitrator, pursuant to Section 22 (Step 4b) of the parties' 2000 Memorandum of Understanding (MOU: Jt. Ex. A), from a list submitted under the MOU by the California State Mediation and Conciliation Service (CSMCS). The parties stipulated that all of the time deadlines and procedures of the Grievance Procedure had been complied with and that the matter was properly in arbitration.

THE ISSUE

At the commencement of the hearing, the parties stipulated to the following statement of the Issue to be resolved:

> Did the City violate MOU Section 10.3 by refusing to provide tuition reimbursement to Lieutenant Bret Smith for the out-of-pocket tuition Lt. Smith paid for his Fall, 2000 class in "Negotiations Tactics" (BEH 522) at California State University, Dominguez Hills ? If so, what should the remedy be ?

RELEVANT PROVISIONS OF THE MOU

The January 1-December 31, 2000 Memorandum of Understanding ("2000 MOU": Jt. Ex A) between the City and its Oroville Mid-Management Association ("OMMA" – UPEC Local 729) provides in pertinent part as follows:

> Section 3. MAINTENANCE OF BENEFITS.
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> It is understood and agreed that there exists within the City certain Personnel Rules and Regulations, policies and benefits regarding members covered by this Memorandum. In the event of proposed changes to City Personnel Rules and Regulations, the OMMA shall be advised, for the purpose of enabling the City and OMMA to meet and confer with respect to any proposed changes. The City shall have the right to change said Personnel Rules and regulations which contravene specific provisions of this Memorandum without first meeting and conferring worth the OMMA.

Section 10. PROFESSIONAL AND EDUCATIONAL DEVELOPMENT

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10.3. If a member can demonstrate that a course offered is directly related to the job performed by the member **or** increases departmental capabilities, the course tuition and books shall be reimbursed to the member upon successful completion ("C" or better grade or "pass" if pass/fail of the course). Documentation to this effect must be presented. Reimbursement shall be capped at $1,200.00 per fiscal year per member. Tuition reimbursement will only be provided under the following circumstances:

A. That the member seek the approval of the Department Head and City Administrator that the selected course is directly related to the job performed **and** increases departmental activity prior to enrollment in the course.

[Emphasis added]

Section 22. GRIEVANCE PROCEDURES.

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22.1. ….a grievance shall be defined as a dispute concerning ….a matter involving the interpretation of or the alleged violation of any provisions of this Memorandum….

22.2. .

…

Step 4c: The arbitrator shall hold such hearings and shall consider such evidence as the arbitrator deems necessary and proper. ….The decision of the arbitrator shall be final and binding on the City and OMMA and the aggrieved member, if any, provided that such decision does not in any way add to, disregard, or modify any of the provisions of this Memorandum.

PROCEDURAL HISTORY

Because the parties stipulated that all of the procedural and timeline requirements of the MOU had been meet and complied with by the Union, and that the matter was properly in arbitration and ready for resolution by the Arbitrator, no discussion of the procedural history is required. There are no claims of delay, waiver, or untimeliness raised by either party.

FACTUAL SUMMARY

In the late 1990's a small group of Oroville mid-managers (including employees of the City's police, fire, planning, and parks departments) organized, affiliated with Local 729, and sought and received recognition from the City as a separate bargaining unit. The employees were motivated to organize, at least in part, by the desire of some of the unit's future members to secure an educational and training reimbursement program, something apparently theretofore percieved to be absent or lacking. The future president (and chief negotiator) of that new labor organization, the Oroville Mid-Managers Association (OMMA), was police lieutenant Bret Smith, the individual grievant herein. Lt. Smith possessed a bachelors degree in public administration and desired to receive a masters degree in a program which would enhance his present capabilities and build his resume for possible future promotion, both laudable goals.

OMMA affiliated with Local 729, and the parties' first negotiations resulted in the 1999 MOU between the parties (Jt. Ex. H) which, in fact, contained a tuition reimbursement program in Section 10 thereof, the predecessor to Section 10 of the 2000 MOU here in question. The former section is identical in all material respects to the present language and differs only in minor language changes not here relevant. The bargaining history on the parties' intent and understandings in regards to this section are sparse, at best. Former Acting City Manager Fred Smith testified that he handled the start of negotiations with OMMA in 2000 but left City employment before negotiations concluded. Smith's first rough draft of the program, as he proposed it to the Union, ended up in the MOU basically intact. Smith and Duran insisted that it was their understanding that each course had to meet the criteria and be separately approved and that there was no City intent to institute a plan which gave blanket approval to a program of study, as opposed to the individual classes in such a program. Lt. Smith's testimony shed no light on any particular discussions or agreements (or expressions of intent by either party, whether agreed to by the other or not) which would add in interpreting the section, although Smith, who was on the OMMA bargaining team for both MOUs, testified that there was no intent on the union's part to bar or preclude masters courses from eligibility, and, indeed, the MOU is silent on any such preclusion or ineligibility.

In sum, as far as the bargaining history is concerned, neither party advanced any evidence which detracted from, or added to, the plain and literal language of the MOU or was of great assistance in interpreting the MOU, assuming that any such extrinsic evidence was admissible at all for this purpose in light of the clear and unambiguous (if inartful) language of the Section. See discussion *infra*, at pp. 8-9.

Lt. Smith had wished to enroll in a masters program and became interested in one recommended to him by the then-Chief of Police, a program offered by the California State University at Dominguez Hills ("CSUS/DH") entitled Behavioral Science: Negotiations and Conflict Management. This program was available over the internet (Un. Exs. 6 and 7), and Smith approached Chief Pitter (who, as noted, was the one who had alerted Smith to the existence of the CSUS/DH program) and sought his approval of the first of the eight classes courses therein. Pitter approved that course, but shortly thereafter left Oroville to become the Chief of Police in Sebastopol (Sonoma County) before Smith actually attended any classes or put in for reimbursement.

On October 25, 2000 Smith put in a memo (Un. Ex. 1) to Chief Brown requesting reimbursement in the sum of $525.00 for CSUS/DH class BEH 540, "Community Conflict". After some dialogue with Smith, and receiving assurances that the predecessor Chief and City Administer had approved the program, Brown approved the request and sent it on to the City Administrator. Mr Duran ultimately also approved the request but while doing so he advised the Chief and Smith that future reimbursement would not be granted because Duran understood and believed that the Council had determined that master's programs were *per se* ineligible under the MOU, in their entirety.[1]

Nothing daunted, on November 8, 2000 Smith again requested reimbursement (Jn. Ex. B) for another of the classes in the program, BEH 522-"Negotiations Tactics".

On December 11, 2000, Chief Brown sent Smith a short, hand-written note (City Ex. C) stating that "…reimbursement will not be approved in the future for master degree programs [and] your current course work [BEH 522] is not approved." On December 14, 2000 Smith filed his initial grievance with the Chief (City Ex. D), complaining that "….I have received reimbursement on previous occasions for course

work in this [masters] program ….[and] the decision to assert that master's programs now no longer qualify for tuition reimbursement is capricious and arbitrary."

Chief Brown responded to the grievance with a lengthy memorandum dated December 21, 2000. The Chief set forth the history of the dispute and asserted that his denial of reimbursement was justified under the MOU, for two reasons: (1) that masters courses were *per se* ineligible under the MOU; and (2) that "…I am not convinced that a Masters Degree in negotiations and conflict management is 'directly related to the job performed by the employee.'"

Lt. Smith then advanced his grievance to the City Administrator level. On February 2, 2001 Mr Duran affirmed the prior decision of the Chief and denied the grievance again. But Duran's memorandum of that date (City Ex. F) did not justify the denial on the "no master's program" ground; instead, he relied primarily upon the Chief's prior conclusion that the course did not "directly relate" to the job and would not "increase Police Department capabilities."

At the hearing, the Union offered into evidence, over objection, two letters on the precise subject, one from Chief Pitter dated March 15, 2001 (Un Ex. 8) and one from former City Administrator Myers dated March 17, 2001 (Un Ex. 9). The City objected to the admission of these letters on the grounds that they were hearsay (certainly true) and the City was being deprived of the opportunity to cross-examine the authors thereof. The Arbitrator overruled those objections but gave the City the opportunity to request a second day of hearing and subpoenas to compel the attendance of Messrs. Pitter and Myers, if so desired. The City never exercised that option. In fact, at the second day of hearing, the City itself offered into evidence the declaration (under penalty of perjury) of the Mayor (City Ex. J) setting forth his understanding of the intent of the language in dispute. The Union observed that the same objection the City had earlier made to its Exhibits 8 and 9 would apply with equal vigor to this Declaration but did not formally object to its admission, and the Mayor's declaration (like the Pitter and Myers letters) was admitted "for whatever it is worth".

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[1] It turned out that this conclusion was incorrect -- courses and classes in master's programs were not deemed to be *per se* ineligible by the Council. Smith's subsequent request was denied by the Administrator

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The letters of Pitter and Myers supported Lt. Smith in his requests. Thus, Chief Pitter wrote:

> ….It is inevitable that Lt. Smith will "negotiate" and manage conflict with the various contacts and interactions he makes. As such, I approved the program, inclusive of its course work, as did the City Administrator Ron Myers. I believed the program (course work) was directly related to Lt. Smith's duties as a police manager and increased the capabilities of the police department., as well as the City. (Un Ex. 8)

Myers' letter was to the same effect. These three documents were admissible, even though the absence of their authors from the hearing deprived the other side of the opportunity to cross-examine the writer at the time the documents were offered. Each document was hearsay (as defined in California Evidence Code Section 1200), but the MOU allows the admission of "….such evidence as the arbitrator deems necessary and proper." MOU, Section 22.2 (Step 4c). Hearsay is almost always admissible in arbitrations, for "whatever it is worth". See, generally, Elkouri, *op. cit*., at pp. 449-452 and Fairweather, "Practice and Procedure in Labor Arbitration, 2d Ed." (BNA, 1986), at pp. 272-276.

CONTENTIONS OF THE PARTIES

UNION. The Union contends that the Negotiations Tactics class in question is **both** "directly related" to the job of an Oroville police lieutenant in general (and to Lt. Smith in particular) **and** that the class " increases departmental activity", the two requisite elements required under MOU Section 10. 3(A); that it was a violation of the MOU for the Chief to deny reimbursement; and that the Grievant should receive an Award ordering reimbursement for this course, subject only to the $1200 per fiscal year

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for other reasons, as described hereinafter.

limit of the MOU. In support of its argument, the Union points to the prior approval of the entire CSUS/DH Masters of Arts Program by Chief Pitter, the predecessor to Chief Brown, and the ratification of that broad program approval by the prior City Administrator, Mr. Myers, as well as Chief Brown's approval of other courses in the CSUS program in question. The union argues both a simple breach of the MOU, as well as promissory estoppel based on the decisions and approvals of the prior administration.

CITY. The City contends that the Chief of Police and City Administrator are granted a broad range of discretion by the MOU; that this Chief did not abuse that discretion by determining that this class (as opposed to prior courses in the CSUS program) met neither (or both) of the requirements of MOU 10.3(A); that MOU 10.3 (A) requires **both**" directly related" **and** " increases departmental activity" as prerequisites to reimbursement; that the Chief has a broad range of discretion in deciding whether those two criteria have been met; and that the incumbent Chief is not bound by the decision of his predecessor on like or similar courses.[2]

DISCUSSION

The pivotal facts are not in dispute. Resolution of the dispute revolves around a proper interpretation and application of Section 10.3(A) of the MOU. This section is less than a masterpiece of legal drafting. For example, the main body of 10.3 uses the disjunctive "or" in generically describing the two requirements of course eligibility ("directly related **or** increases departmental capabilities"), whereas 10.3 (A) uses the conjunctive "and" in describing specifically what the Department Head (here the Chief of Police) or Administrator must find ("directly related **and** increases departmental activity") prior to course approval. Fortunately, we are not faced with resolving this

[2] The City also makes, at pp. 4-5 of its Post-Hearing Brief, a convoluted and confusing argument about the impact of a new MOU on a previous agreement or understanding of the parties,. Frankly, the Arbitrator does not understand this argument all – there are two MOUs in question, they both contained the tuition program in question, and surely no one could argue that the mere fact that the first MOU was replaced by the second somehow wiped out all contractual commitments and undertakings under the first, especially where, as here, the "new" MOU was essentially identical to the "old" MOU in all relevant particulars.

possible conflict, as the parties agree that the conjunctive "and" is here applicable to the approval process.

It is the duty of the arbitrator (as it would be of a court) to interpret and apply the literal language of the contract. If that language is clear and unambiguous and subject to only one reasonable interpretation, no resort to extrinsic tools or aids (such as bargaining history, correspondence bewteen the parties, testimony as to past administrative practice, etc.) is required or permitted. As stated in Elkouri & Elkouri, "How Arbitration Works, 5th Ed." (BNA, 1997):

> There is no need of interpretation unless the agreement is ambiguous. If the words are plain and clear, conveying a distinct idea, there is no occasion to resort to technical rules of interpretation and the clear meaning will ordinarily be applied by arbitrators.
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> An agreement is not ambiguous if the arbitrator can determine its meaning without any other guide than a knowledge of the simple facts on which, from the nature of the agreement in general, its meaning depends.

Elkouri, *op. cit*., at p. 470.

While Section 10.3 (A) is clumsy and poorly worded, that does not necessarily mean that it is vague, ambiguous, or in need of extrinsic aids to its interpretation. For example, although the word "course" is not defined, the parties appear to agree (as they should) that "course" means "class", in the sense of a single class or one course such as, e.g., "English 101" or "Introduction to Biology IA", as opposed to "The College's Program in English Literature". The section requires the applicant to "seek approval" (which implies a broad range of discretion in the party whose "approval" is sought) of "the course", and then goes on to talk of two elements which must be met before that approval can be granted. The Union raises two arguments here, one directly applicable to the unique facts of Lt. Smith's circumstances and the other applicable to any one seeking reimbursement.

First, as to Lt. Smith's unique situation, the Union argues that Chief Brown and Administrator Duran had no discretion because the decision had already been made for them, by their predecessors, Messrs. Pitter and Ryan. Pointing to Union Exs. 8 and 9, the Union contends that Smith sought and received blanket approval from Pitter (ratified by Myers) for the entire masters program (and, by necessary implication, each and every "course" in that program), and that thereafter Brown had no choice but to mechanically sign off on each class in the program as it was presented to him.

It is the second contention of the Union that, Lt. Smith's situation to one side, in every case, identifying, defining and applying the two MOU elements ("directly related" and "increases departmental activity") are entirely objective and quantifiable steps; that no subjectivity on the part of the decision-maker is allowed in the equation; and that if those two elements are present, "approval" ceases to be discretionary and becomes a ministerial duty.

In regards to Lt. Smith's unique case, the Union argument goes too far. The MOU requires approval of a "course" – that is, of a discrete and identifiable class. Prior blanket approval of an entire program of study does not, under this MOU, constitute the required approval of a course in a program. Master's programs often take more than one year – they may consume several years. The individual classes and courses therein (and the instructors and their materials and approaches) may change, alter, be added or eliminated, or simply fade, depending on the whims and needs of those administering the program. Chief Pitter's claimed advance approval of the entire CSUHS/Dominguez Hills program (for which there is no documentary support beyond Pitter's *post hoc* letter of March 15, 2001: Un Ex 8) cannot substitute for the contractually-required approval of the Chief of Police in office at the time the course commences and reimbursement is sought.

The Union's second argument (that application of the MOU criteria is strictly mechanical and allows of no discretion) has some attraction on the "directly related" language but loses it when we come to the "increases departmental activity" aspect. The question of what "departmental activity" the City wishes to increase is a choice left to the Department Head and the Administrator, under this MOU.

This is essentially an "abuse of discretion" case. This MOU gives the department head/Chief a broad discretion to make at least one of the two pivotal determinations.

"Directly related" allows little wiggle room for the City and has a strong objective aspect. But "increases departmental activity" goes to the broad goals of the Chief and the "activity" he wishes to increase. And that is a choice which may change from chief to chief. Today's chief may be a zealous "community based policing" advocate, whereas his/her successor may believe that approach to be a silly modern fad, one more of form than of substance which he does not wish to perpetuate. Under the latter scenario, the fact that the first chief granted approval for a series of community-based policing classes does not preclude his successor from deciding to take the department in a different direction and disapproving such classes in the future.

That is, in essence, what happened here. Chief Pitter thought these courses and the program useful — Chief Brown, his successor, disagrees. Under the MOU, that is a discretionary choice this Chief is allowed to make.

Reasonable minds can (and did) differ over Chief Brown's conclusions on the application of the two elements of 10.3(A) to these courses, especially in the close and complex facts in this case. The prior Chief and Administrator obviously thought these two criteria were met by the entire CSUHS program, both with and without specific reference to the individual courses therein. Chief Pitter had a high regard for the value of a course in "negotiations" – but the present Chief and Administrator believed the value of the particular course in question to be too remote and tangential to the operations of the OPD today.

Did Chief Brown abuse his discretion in making that determination ? No. The former Chief of Police and City Administrator, and perhaps even the Arbitrator, may not agree with his conclusions[3], but that is not the issue. The parties agreed to add this program to the MOU and provided, as safeguards against possible abuse or reimbursement for classes now deemed unrelated to departmental goals, a broad

[3] Indeed, were the Arbitrator's role here a *de novo* one, he might well disagree, if he believed that advanced skills and expertise in dispute resolution are valuable in all aspects of police work, especially in a committed "community-policing" oriented agency. Life is a just a series of negotiations, in every facet, from picking the kids' cereal at breakfast, to where to have lunch, to which of two competing employees should get Christmas Day off. Probably no one in public life has to do more "negotiating" on a daily basis with the public he/she serves than the working police officer. Possessing advanced skills and exposure in these areas could be extremely valuable. But that would only be the Arbitrator's personal, subjective belief. Here, the MOU gives these sensitive choices to the City's Chief of Police, not to a third party arbitrator, unless there is a clear and patent abuse of discretion, a situation we do not have here.

discretion in the Department Head/Chief to approve or not. The Arbitrator cannot substitute his discretion, judgment, or opinion for the Chief's.

Where an administrative body or manager is given a range of discretion, his exercise thereof will only be set aside upon a showing of a clear abuse. As the California Supreme Court stated in Martin v Alcoholic Bev. Etc. Appeal Board, 52 Cal 2d 287 (1959);

> …where the propriety of the [decision] imposed by an administrative agency is a matter vested in the discretion of that agency, …its decision thereon will not be disturbed unless there has been a clear abuse of discretion. (Nardoni v McConnell, 48 Cal 2d 306; Bonham v McConnell, 45 Cal 2d 304, 306; Griswold v Department of Alcoholic Bev. Control, 141 Cal App 2d 807; Altadena Community Church v State Bd. of Equalization, 109 Cal App 2d 99, 104, 106-107. The statutory provision defining the scope of judicial inquiry into the validity of an administrative decision expressly declares that the court's "judgment shall not limit or control in any way the discretion legally vested' in the administrative agency. (Code Civ Proc., &1094.5, subd. e).

In Schmitt v City of Rialto, 164 Cal App 3rd 494 (1985), the court restated the general rule that "…if reasonable minds can differ as to the propriety of the [decision made], the administrative decision may not be regarded as an abuse of discretion ….[and] clearly this is a case in which reasonable minds may differ… [and because] the city council has the responsibility, their [sic] view of the matter must be respected." 164 Cal App 3rd 494, at 504.

Applying this rationale to this MOU, it cannot be said that Chief Brown has abused the discretion the MOU directly gives him.

In regards to the elements of promissory estoppel, what has been said above about the right of the incumbent chief to exercise his discretion as he sees fit militates against applying the doctrine of estoppel here. The mere fact that Chief Pitter believed the whole program (and, by implication, each class therein) met the MOU's criteria does not mean that those criteria are immutably locked in concrete – they are subject to the differing views of a new department head/chief who, quite often, may well have been hired to take the department in a different direction. And, as noted above, the MOU requires approval

of each class, on a class-by-class basis – prior, blanket approval of a program of study is not anticipated or allowed by the MOU.

Finally, in regards to generic estoppel principles, here there can be no showing of the requisite detrimental reliance by Lt.. Smith – he was directly and unequivocally told as he enrolled in this course that a request for reimbursement would not be honored.

CONCLUSION AND AWARD

In light of the foregoing discussion and analysis, the Grievance of Lt Smith is DENIED.

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July , 20001 Christopher D Burdick